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SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Appellant

vs.

CASE NO. 81,803

District Court of Appeal
3d District - No. 91-1913

MARK ALFORD HERRE,

Appellee.

_____/

AMENDED REPLY BRIEF OF APPELLANT, THE STATE OF FLORIDA, DEPARTMENT OF REVENUE

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ARGUMENT

I. SELF-INCRIMINATION

At page 12 of the Answer Brief, Herre makes the following statement:

> Thus, contrary to the Department, section 212.0505 on its face is applicable solely to criminal activity.

Herre makes this observation after reciting the statute's provision for a 50 percent tax and 25 percent surcharge on the retail value of the drug. It is unclear as to what point is being made by Appellee. The Initial Brief has already anticipated and answered this argument at pages 6 and 7:

> All that a Florida sales tax taxpayer must show on the return is the amount of the total sale.

In short, the form itself does not require a drug taxpayer to incriminate himself merely by writing in the bottom line amount and sending in the form with a check.

Next, Herre restates Judge Jorgenson's dissent in the lower court regarding the lack of administrative rules. However, section 212.0505(3), Florida Statutes, declares only that the Department "may adopt rules for administering the taxes imposed by this section." The use of the verb "may" indicates a permissive direction to the DOR, not a mandatory one.

Insofar as the command of section 212.18(2), Florida Statutes, the DOR has published rules for the collection of sales tax. See Chapters 12-15, 12-16, 12-17, 12-21 and 12A-1, Florida Administrative Code. Moreover, the provision quoted above and

contained within section 212.0505(3), Florida Statutes, controls over the generalized provision of section 212.18(2), Florida Statutes, since the former section is both more specific and was enacted later in time than the latter section in section 212.18(2), Florida Statutes. Dept. of Health and Rehabilitative Services v. American Healthcorp. of Vero Beach, Inc., 471 So. 2d 1312 (Fla. 1st DCA 1985), adopted 488 So. 2d 824 (Fla. 1985).

Thus, the lower court's dissent and Herre's argument about the need for rule adoption are mistaken.

At page 13 of the Answer Brief, Appellee cites section 212.18(3)(a), Florida Statutes, which requires "dealer" registration with the DOR. Again, there is no penalty for failing to describe the exact nature of one's business on the form. (See line 8 of the first form of Appellee's Appendix.) As was asserted at pages 7 and 8 of the Initial Brief, Florida's system of sales taxation allows the taxpayer to "control" his own self-incrimination by disclosing, or not disclosing, certain details about his business.

At page 18 of Herre's brief, it is claimed that the registration requirements are every bit as "revealing" as those at issue in Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968); Grosso v. United States, 390 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968); and Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 889 (1968). But, as shown above, tax payment and registration in Florida are under the control of the taxpayer for purposes of self-incrimination. Interestingly, Herre does not specify how registration is

inherently self-incriminatory. When one registers as a "dealer" under section 212.18(3)(a), Florida Statutes, it does not mean that he must disclose what kind of "dealer" he is.

In Marchetti, supra, the Court noted that IRS Form 11-C required registrants to indicate "whether they are engaged in the business of accepting wagers." 88 S.Ct. at 699. No such equivalent requirement exists under Florida sales tax law.

The Grosso Court found that IRS Form 730 must be submitted each month and that the return is expressly designed for the "use only of those engaged in the wagering business." 88 S.Ct. at 712.

Similarly, section 4751 of the Marijuana Tax Act in Leary, supra, required all persons who "deal in" marijuana to be subject to an annual "occupational tax." 89 S.Ct. at 1536. Moreover, a transferee of marijuana could not receive the drug "except pursuant to a written order form" which was obtained from the government. Id. at 1537. The transferee also had to disclose information about himself and the transaction. Another provision allowed the information to be made available to law enforcement. Id.

Here again, Florida's sales tax law does not require anything different of a drug dealer than of any merchant. And no incriminatory information is required -- unlike the above three U.S. Supreme Court cases. Therefore, Appellee's statement at page 18 of his brief about Florida's registration requirements being "every bit as revealing as those at issue in Marchetti, Grosso and Leary," is just not borne out once the federal

statutes and IRS forms are compared to Florida's statutes and the DOR's forms.

Appellee maintains that because "the tax itself is applicable only to those engaged in illegal activities" there is a self-incrimination hazard. No further elaboration upon this contention is made. Perhaps Appellee is referring to the different tax rates? If so, the drug taxpayer need not reveal the difference in rates by merely showing only the bottom line amount without showing the rate itself, i.e. 50 percent versus six percent.

At pages 19-22 of the Answer Brief, Appellee argues that section 213.085, Florida Statutes, does not provide any assurance against use of drug tax information. As argued in the Initial Brief before this Court, the DOR urges that section 213.085, Florida Statutes, should never have been examined by the lower court without first determining whether Florida's sales tax laws, chapter 212 and section 212.0505, Florida Statutes, are inherently self-incriminatory. Thus, Appellee's arguments about section 213.085, Florida Statutes, bypass the real threshold issue.

On page 22 of Appellee's brief, Florida's tax under section 212.0505, Florida Statutes, is described as "analogous" to the tax struck in the case of State v. Roberts, 384 N.W.2d 688 (S.D. 1986). Yet at page nine of the Initial Brief, the case of State v. Roberts, supra, was distinguished because South Dakota is a drug stamp tax state while Florida is not.

In the Answer Brief, Florida's statute is compared, at page 23, to defective statutes in Idaho, South Dakota and Colorado on the basis that the taxpayer information could be obtained by law enforcement. However, Appellee avoids addressing whether Idaho, South Dakota or Colorado are similar to Florida in that one can pay taxes in Florida without self-incrimination.

II. ARE HERRE'S RIGHTS VIOLATED BY THE ABSENCE OF DOR RULES? [RESTATED]

As noted at page 1-2 herein, section 212.0505(3), Florida Statutes, declares only that the Department "may adopt" rules. The DOR has promulgated rules for Chapter 212 in general. Thus, the administrative procedure requirement cited by Herre has been satisfied.

In Gulfstream Park v. Division of Pari-Mut. Wagering, 407 So. 2d 263 (Fla. 3d DCA 1981), the Court held that the applicable statutes did not support a conclusion drawn by the agency and, further, if the agency had a policy reason for its conclusion it should have adopted a rule to that effect. Id. at 265.

The assessment itself, in the case sub judice, was entirely supported by various provisions of Chapter 212 including section 212.0505, Florida Statutes. There is no "policy" involved.

Another case cited by Appellee, Department of Revenue v. U.S. Sugar Corp., 388 So. 2d 596 (Fla. 1st DCA 1980), does not apply to the case sub judice because U.S. Sugar dealt with an adopted rule which went beyond the scope of its enabling statute.

And in State, Department of Administration v. Harvey, 356 So. 2d 323 (Fla. 1st DCA 1977), the issue was whether an agency statement was really a "rule" under administrative law.

Finally, McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977), cited by Appellee, merely holds that agency policy ("incipient policy") should be reduced to a rule. But here, in the case sub judice, there is no agency policy at issue. Rather, it is the sales tax statutes and the Appellant's enforcement of those statutes which are at issue in these proceedings.

Appellee's brief, at pages 25-26, cites the Bank Secrecy Act and California Bankers Association v. Schultz, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974), for the argument that the DOR should have adopted rules. But this case can be easily distinguished from DOR's situation since the Florida Legislature did not condition the operation of section 212.0505, Florida Statutes, upon promulgation of rules.

Insofar as U.S. v. Reinis, 794 F.2d 506 (9th Cir. 1986) is concerned, it simply does not apply. The conviction of Reinis was reversed because the U.S. Government relied upon a form without a rule in place. In the words of the Reinis Court, supra, criminal penalties for failure to report currency transactions can attach "only upon violation of regulations promulgated by the Secretary." Id. at 508.

In the case sub judice, the DOR has maintained that Herre should have reported his sales tax, like any other merchant, on the same form that applies to all sales transactions. (The point being that Herre is not singled out from the rest of the taxpayers.)

Lastly, Appellee's argument, based as it is upon the lower court's dissent, was not persuasive to the majority. If the dissent had been correct, the majority would have adopted it as the majority opinion under the rule that Courts should not reach the constitutionality of a statute if the case can be disposed of on other grounds. Singletary v. State, 322 So. 2d 551 (Fla. 1975); McKibben v. Mallory, 293 So. 2d 48 (Fla. 1974).

III. HERRE IS NOT PLACED IN DOUBLE JEOPARDY

At pages 29-35, Herre argues that he was placed in double jeopardy by the drug tax statute at issue. Herre cites to In Re: Kurth Ranch, 986 F.2d 1308 (9th Cir. 1993) as authority for his position.

To begin with, the Florida Supreme Court is not bound by a decision of the Ninth Circuit. Secondly, the Montana Department of Revenue has petitioned for certiorari to the U.S. Supreme Court. As of this writing, the Petition is still pending.[1] Further, in the case of Sorenson v. State Department of Revenue, 836 P.2d 29 (Mont. 1992), the Montana Supreme Court ruled just the opposite of the Kurth Ranch Court, supra. None of this information was brought to this Court's attention by Appellee in his Answer Brief.

It must also be noted that Herre pleaded nolo contendere to attempted trafficking for the same incident at issue herein and was sentenced and fined.

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[1] Department of Revenue of the State of Montana v. Kurth Ranch, U.S. Supreme court Case No. 93-144.

States can tax illegal activity. Marchetti v. U.S., supra, ("illegal activities are subject to taxation authority"). Since it can be concluded that one can be held criminally liable and civilly liable (for the tax) for the same activity, something more must be shown to invoke double jeopardy.

At pages 30-32, the Answer Brief cites to U.S. v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) as major authority for his Double Jeopardy violation argument.

But U.S. v. Halper, supra, involved a ruling by the U.S. Supreme Court that the civil statute involved, the federal False Claims Act, was unconstitutional as applied, not facially unconstitutional under the Double Jeopardy Clause.[2] The Court then remanded the case to the lower court to give the government an "opportunity to present an accounting of its actual costs arising from Halper's fraud." 109 S.Ct. at 1903.

Throughout its opinion, the Halper Court emphasized that its ruling was for only unusual cases:

> What we announce now is a rule for the rare case, such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.

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[2] The following decisions have upheld a tax on dangerous drugs and held that assessment of the tax itself did not violate the double jeopardy provision of the federal Constitution under the Supreme Court's decision in Halper: Hyatt v. State Dept. of Revenue, 597 So. 2d 716 (Ala. Civ. App. 1992) (total assessment of $198,000 for 494.5 grams of cocaine); Birney v. State, 594 So. 2d 120 (Ala. Civ. App. 1991)(tax of $80,000 on 989 dosage units of LSD); Harris v. State Dept. of Revenue, 563 So. 2d 97 (Fla. Dist. Ct. App. 1990); Rehg v. The Illinois Department of Revenue, 605 N.E.2d 525 (Ill. 1992); State v. Berberich, 811 P.2d 1192 (Kan. 1991); and State v. Riley, 166 Wis. 2d 299 (Wis. Ct. App. 1991) (total assessment of $89,816 on 217 grams of cocaine).

Id. at 1902.

The Appellee would have one believe that tax collected pursuant to Florida's drug tax state, section 212.0505, Florida Statute, is a "penalty" rather than a revenue-generating measure. This is wrong. For support, the DOR relies on United States v. Sanchez, 340 U.S. 42, 71 S.Ct. 108, 95 L.Ed. 47 (1950).

In that case, the United States Supreme Court upheld a tax on illegal drugs, rejecting some of the same arguments which Herre appears to be raising. In particular, the taxpayer's argument that tax and interest assessed under the "Marijuana Tax Act" levied a "penalty" and not a tax.

In rejecting Sanchez's argument that the tax was merely a disguised regulatory effort and was penal in nature, the Court in Sanchez held:

> First. It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. Sozinsky v. United States, 300 U.S. 506, 513, 514, 81 L. Ed. 772, 775, 776, 57 S.Ct. 554 (1937). The principle applies even though the revenue obtained is obviously negligible.

United States v. Sanchez, 340 U.S. at 44.

In conclusion, the tax portion of the assessment is not a criminal penalty for two reasons: (1) liability for the tax arises from a transaction, and not from the subsequent failure to file a tax return or to pay the tax; and (2) the tax is purely a civil tax, notwithstanding that it may discourage criminal activity. See Sanchez, supra.[3]

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[3] Halper has been called a "depart[ure] from fifty years of

Tax laws have long been used to both raise revenue and regulate activities. Case law holds that the government may tax an activity out of business where it is inimical to public health, welfare and safety as, for example, under the 21st Amendment. See, State Board of Equalization of California v. Young's Mkt. Co., 299 U.S. 59, 62 (1936) 57 S.Ct. 77, 81 L. Ed. 38.

Tax statutes, although civil in nature, should not be seen as equivalent to, or analogous with, the federal False Claims Act.

Halper, supra, is discussed in a First Circuit civil forfeiture case known as U.S. v. A Parcel of Land With A Bldg. L. Thereon, 884 F. 2d 41 (1st Cir. 1989). In U.S. v. A Parcel of Land, the Court indicated that a much broader approach should be taken when estimating a means of remedying the government's injury and loss:

> The ravages of drugs upon our nation and the billions the government is being forced to spend upon investigation and enforcement -- not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation, and prevention -- easily justify a recovery in excess of the strict value of the property actually devoted to growing the illegal substance, in this case marijuana.

884 F.2d at 44.

Appellee complains that the assessment of $236,250 (R-1) is far out of proportion to the State Attorney's investigative costs

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double jeopardy jurisprudence." Note, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings after* United States v. Halper, 76 Univ. Va. L. Rev. 1251 (1990).

of $117, and, therefore, the Double Jeopardy Clause has been violated. Yet Appellant has failed to grapple with the fact that the assessment in question is a tax and not a civil fine, nor a civil penalty or civil forfeiture. Not one of Appellee's cases concern a tax case and the Double Jeopardy Clause.

In the case sub judice, 300 pounds of marijuana were valued by the agency as having an estimated retail price of $210,000. Appellee would have made at least this much money, tax-free, were he not caught. Like any other item used or sold in a transaction in Florida, Herre's "goods" are subject to a tax. Essentially, Appellee is saying that the State of Florida, because of the Double Jeopardy Clause, can do only one of two things: (1) either prosecute him in criminal court, or (2) tax him. But the State, if the argument be taken to its logical conclusion, can not do both.

A tax is clearly "remedial" in nature whether it be for raising revenue or regulation or both. It behooves the government to try to "capture" some of the money being made through the business of drug dealing and section 212.0505, Florida Statutes, is the Florida Legislature's attempt to tax a lucrative industry.

On pages 33-34, Herre holds that the drug tax herein is for "retributive purposes." For this proposition, U.S. v. Brown, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965), is cited. But in regards to the assessment against Herre, no "disenfranchisement" by legislation has ever taken place. Unlike Brown, in U.S. v. Brown, supra, Herre has not been the subject of legislation

merely because of his political status, affiliation, organizational membership, etc.

At page 35 of the Answer Brief, the DOR is accused of ignoring Lipke v. Lederer, 259 U.S. 557, 66 S.Ed.2d 1061, 42 S.Ct. 549 (1922). It was on procedural due process grounds that the Lipke Court struck the "tax."

IV. THE FOURTH AMENDMENT WAS NOT IMPLICATED

The Department of Revenue asserts that the fact that its assessment of tax in this case was made as a result of a search of Herre's vehicle by officers of the Monroe County Sheriff's Department should not be disturbed by a challenge to the search on Fourth Amendment grounds.

The First District Court of Appeal addressed this issue in Harris v. Department of Revenue, 563 So. 2d 97 (1st DCA 1990), rev. denied, 574 So. 2d 141.

In Harris, the Court stated that the second sentence of section 212.0505(5), Florida Statutes, provides that the suppression of evidence in a criminal case does not affect an assessment under section 212.0505, Florida Statutes. The Court further stated that this provision is consistent with the well-established principle that the seizure of evidence in violation of the Fourth Amendment does not preclude admission of that evidence in a civil proceeding. See United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976); Tirado v. Commissioner of Internal Revenue, 689 F.2d 307, (2d Cir. 1982), cert. den., 460 U.S. 1014, 103 S.Ct. 1256, 75 L.Ed.2d 484 (1983); Jonas v. City of Atlanta, 647 F.2d 580 (5th Cir. 1981).

The First District Court of Appeal, in Harris, supra, also distinguished the drug tax proceeding from civil forfeiture cases. The Court explicitly rejected Harris' analogy to the applicability of the Fourth Amendment's exclusionary rule to forfeiture proceedings.[4] The Court went on to state that forfeiture cases provide an additional penalty for violating a criminal law to which Fourth Amendment principles absolutely apply. Jonas v. City of Atlanta, 647 F.2d 580, 587-88 (5th Cir. 1981).

Different standards are applicable in criminal cases. See, for example, Moseley v. Ewing, 79 So. 2d 776, 778 (Fla. 1955). Yet at page 37 of the Answer Brief, Herre asserts that "the exclusionary rule applies to civil proceedings" and cites to Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) and to One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965).

Marshall, supra, involved warrantless searches of business premises pursuant to OSHA inspection. The case sub judice does not involve a search of Here's business or home. Motor vehicles are, of course, treated differently under the Fourth Amendment than are homes and businesses. See, for example, footnote 10 at page 1822 of Marshall v. Barlow's, Inc., 98 S.Ct. 1816 (1978). Secondly, in the next case cited by Appellant, One 1958 Plymouth, supra, the cause of action was civil forfeiture, not tax assessment.

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[4] See 565 So. 2d at 100.

Turning to the facts of Herre's case, it can be readily seen that application of the exclusionary rule to the tax proceeding herein would have little or no deterrent effect on the Monroe County Sheriff's Department. In short, the rule's effect on the Department of Revenue would not, somehow, pass to local law enforcement. As a result, the exclusionary rule's intended purpose (deterrence) would be defeated.

How then can Herre legally raise the issue of the exclusionary rule when it was waived once he pled nolo contendere? See, for example, Harris v. Department of Revenue, 563 So. 2d 97, 100 (Fla. 1st DCA 1990). See also, Peel v. State, 150 So. 2d 281 (Fla. 2d DCA 1963)

V. THE TAX ASSESSMENT IS VALIDLY BASED UPON UNLAWFUL TRANSPORTATION OF CANNABIS AND NOT UPON "UNLAWFUL TRAFFICKING"

On pages 42-43, Here believes that DOR must "establish constructive possession" by satisfying three elements: (1) dominion and control, (2) knowledge of the presence of the contraband, and (3) must know of its illegal nature.

Herre has gone astray by forgetting that section 212.0505(1)(a), Florida Statutes, merely states that:

> Every person is exercising a taxable privilege who engages in this state in the unlawful sale, use, consumption, distribution, manufacture, transportation, or storage of . . . cannabis as defined in §893.02 . . . (e.s.)

Thus, Herre exercised a "taxable privilege" by transporting 300 pounds of cannabis, in the car he was driving, when he was stopped by Deputy Sheriff Emrall.

CONCLUSION

Having been caught transporting cannabis, Herre was correctly found to be "engaging in a taxable privilege." Accordingly, the agency's Final Order and assessment at issue should be upheld and the lower court's decision reversed. Florida's drug tax statute does not facially violate the self-incrimination clause of the U.S. Constitution.

Respectfully submitted,

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CERTIFICATE OF SERIVCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Reply Brief of Appellant has been forwarded this 31st day of August, 1993 to G. Richard Strafer, Esquire, Quinon & Strafer, P.A., 2400 South Dixie Highway, Miami, FL 33133 and Stephen J. Bronis, Esquire, 66 West Flagler Street, 11th Floor, Miami, Florida 33130.

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